TAN SRI ABDUL AZIZ ZAINAL & ORS v. LEMBAGA PENGARAH BANK KERJASAMA RAKYAT MALAYSIA BHD & ORS

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
CHE MOHD RUZIMA GHAZALI JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-01(A)-127-03-2021]
21 JULY 2023

Abstract – *The time frame prescribed in the Rules of Court 2012 for judicial review application is fundamental and must be strictly adhered to, and the merit of the application becomes irrelevant. However, if there appears sufficient or good explanation for the delay, the court may exercise its discretion in allowing extension of time. In any event, the court would only entertain a matter upon determining the 'justiciability' of the matter. Once ruled non-justiciable, judicial review would not be available.*

CIVIL PROCEDURE: *Judicial review – Application for leave – Challenge against decision of Minister – Delay in application – Whether application based on inter-connected decisions – Whether to be viewed as series of decisions – Whether final decision amounted to new decision or mere confirmation of earlier decision – Whether extension of time warranted – Whether reasons proffered for delay – Rules of Court 2012, O. 53 r. 3(6) & (7)*

CIVIL PROCEDURE: *Judicial review – Application for leave – Challenge against decision of Minister dismissing application to terminate operation of legislation act ('Act') – Power to terminate operation of Act – Whether to be determined by Minister with concurrence of Minister of Finance – Whether pure policy decision – Whether court lacked power to meddle with policy decision – Whether matter non-justiciable – Whether amenable to judicial review – Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978, s. 31*

This was an appeal against the decision of the High Court in dismissing the appellants' ('applicants') application for leave to commence judicial review proceedings to quash the purported administrative decision made by the Menteri Pembangunan Usahawan dan Koperasi ('second respondent') and Lembaga Pengarah Bank Kerjasama Rakyat Malaysia Berhad ('first respondent') in relation to the enforcement of Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 ('Act 202'). The third and fourth respondents were Menteri Kewangan Malaysia and Kerajaan Malaysia, respectively. The reliefs sought by the applicants in the judicial review were, *inter alia*: (i) a declaration that the Act 202 is a piece of legislation that was meant to be in force only temporarily, and thus s. 31 of the Act 202 empowers the Minister to declare, by order published in the

Gazette, that the Act 202 shall cease to remain in force, which against the backdrop of the facts pleaded by the second, third and fourth respondents were duty-bound to exercise the same forthwith; (ii) a *certiorari* order to vest to this court, and to quash the decisions made by the second respondent, on 12 April 2019 and 23 August 2019 respectively, in refusing the applicants' representation and appeal for the operation of the Act 202 to be terminated as provided for under s. 31(2) of the Act 202; (iii) a *certiorari* order to vest to this court, and to quash the decision made by the first respondent on 4 May 2020 in refusing the applicants' request that an extraordinary general meeting be held for the necessary motion to be tabled to call for the termination of the Act 202 under s. 31 of the Act 202; (iv) a *mandamus* order to compel the second respondent to exercise the powers and discretion under s. 31 of the Act 202 to terminate the operation of the Act 202; and (v) as a matter of precaution, but only if ruled necessary, that the applicants be given leave to initiate the judicial review application, out of time. In response to the application, the AG's Chambers raised two preliminary objections: (i) whether the application was within time and if the answer was in the negative, whether there were good reasons to warrant an extension of time; and (ii) whether the second respondent's decision in dismissing the applicants' application to cease the operation of Act 202 was amenable to judicial review. The High Court, in dismissing the application *in limine*, held: (i) there was a delay of almost 11 months and nothing was advanced by the applicants to show that they had a good reason, or any reason at all for that matter, for failing to file the application promptly; (ii) the decision of the Minister on whether to cease the operation of the Act 202 was not a decision that should be reviewed by the court on the merits of the application since the court was not equipped with the necessary tools to examine the policy decision made by the Minister and therefore, the decision of the second respondent was non-justiciable and not amenable to judicial review. Hence, this appeal.

Held (dismissing appeal with costs)

Per Che Mohd Ruzima Ghazali JCA delivering the judgment of the court:

(1) Generally, the failure to comply with the prescribed time-limit provided under the Rules of Court 2012 ('ROC') is fatal. However, under O. 53 r. 3(7) of the ROC, the court could exercise its discretion to extend the time-limit if it is positively satisfied that it is proper to do so. The *prima facie* rule is that the applicant must show good reasons for the delay. There was no explanation at all by the applicants for the delay. Further, to cease operation of the Act 202 as prescribed under sub-s. 31(1) of the Act 202, the discretion was given to the second respondent. Thus, any challenge should be against the second respondent's decision and not anyone else. Also, once the High Court had rejected the explanation for the delay, the High Court ceased jurisdiction to hear the application for an order of *certiorari*. (paras 12, 13 & 22-25)

(2) The second respondent rejected the applicants' request to terminate the operation of Act 202 *via* the letter dated 12 April 2019 ('rejection letter'), which was received by the applicants on 16 April 2019. It followed that the time to file the judicial review application against the second respondent's decision started to run from 16 April 2019 until 16 July 2019. However, the applicants, instead of filing a judicial review challenging the second respondent's rejection, wrote another letter, requesting the second respondent to review his decision dismissing their application. From the plain reading of the second rejection letter, it was obvious that the second respondent did not make any new decision with regard to the applicants' application to terminate the operation of the Act 202. The second respondent emphasised that there was no need to review the enforcement of the Act 202 and had also stressed that his earlier decision was final. Therefore, the second rejection letter was not a new decision by the second respondent. (paras 15-17)

(3) The first respondent's decision not to call the general meeting as requested by the applicants was a separate and distinct decision from the second respondent's decision *via* the rejection letter. The discretionary power to terminate the operation of the Act purely lies with the second respondent with the concurrence of the Minister of Finance and not with the first respondent as clearly provided under sub-s. 31(1) of the Act 202. Thus, the appellants' effort to tie up the first respondent's decision in rejecting the calling of a general meeting with the second respondent's decision in rejecting the application to terminate the operation of the Act 202 as a series of decision, could not stand. (para 20)

(4) Under the law, only the second respondent with the concurrence of the MOF could determine the appropriate time to terminate the enforcement of the Act 202. As a Minister that oversees the implementation and the enforcement of the Act 202, the second respondent had clearly indicated that it was not suitable to terminate the operation of the Act 202 under the current situation. The second respondent had purely made a policy decision in exercising his discretionary power. It is trite that the courts normally do not meddle with the policy decision. Hence, the decision of the second respondent was non-justiciable and not amenable to judicial review. (paras 29-31)

Case(s) referred to:

Ah San v. Majlis Bandaraya Ipoh & Ors [2000] 2 CLJ 125 CA ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 ***(refd)***

Duport Steels Ltd & Ors v. Sirs & Ors [1986] 1 WLR 142 ***(refd)***

Fothergill v. Monarch Airlines [1980] 3 WLR 209 ***(refd)***

A *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd [2017] 5 CLJ 283 CA* ***(refd)***
Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd [2019] 4 CLJ 454 CA ***(refd)***
Loh Kooi Choon v. Government Of Malaysia [1975] 1 LNS 90 FC ***(refd)***
Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***
B *Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC* ***(refd)***
Mohd Ismail Abd Ghani v. Ketua Pengarah Pendaftaran Negara & Anor [2011] 5 CLJ 660 HC ***(refd)***
Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***
C *R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC* ***(refd)***
Ravindran P Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC ***(refd)***
V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors [1997] 2 CLJ 675 CA ***(refd)***
Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***
D *Yahya Kassim v. Kerajaan Malaysia & Anor [1998] 1 CLJ 43 CA* ***(refd)***

Legislation referred to:
Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978, ss. 3(1), 28(1), 31(1)
Rules of Court 2012. O. 53 r. 3(6), (7)

E *For the appellant - Wee Yeong Kang; M/s Shafee & Co*
For the respondent - Ng Wee Li; FC

[Editor's note: For the High Court judgment, please see Tan Sri Abdul Aziz Zainal & Ors v. Lembaga Pengarah Bank Kerjasama Rakyat Malaysia Bhd & Ors [2021] 1 LNS 2044 (affirmed).]
F

Reported by S Barathi

JUDGMENT

G **Che Mohd Ruzima Ghazali JCA:**

Introduction

[1] This is an appeal against the decision of Kuala Lumpur High Court dated 10 February 2021 in dismissing the appellants'/applicants' application for leave to commence judicial review proceedings to quash the purported administrative decision made by the Menteri Pembangunan Usahawan dan Koperasi (second respondent) and Lembaga Pengarah Bank Kerjasama Rakyat Malaysia Berhad (first respondent) in relation to the enforcement of Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 (Act 202). Two others named in the judicial review were Menteri Kewangan Malaysia (third respondent) and Kerajaan Malaysia (fourth respondent). The
H
I

reliefs sought by Tan Sri Abdul Aziz bin Zainal, Datuk Mustafha bin Abdul Razak and Datuk Rahim bin Yunus (appellants/applicants) in the judicial review if the appellants/applicants were granted leave are as follows:

(i) a declaration that the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) 1978 (Act 202) is a piece of legislation that was meant to be in force only temporarily, and thus s. 31 of the Act 202 empowers the Minister to declare by order published in the *Gazette* that the Act 202 shall cease to remain in force, which against the backdrop of the facts pleaded by the second, third and fourth respondents are duty-bound to exercise the same forthwith;

(ii) a *certiorari* order to vest to this court, and to quash the decisions made by the second respondent on 12 April 2019 and 23 August 2019 respectively in refusing the applicants' representation and appeal for the operation of Act 202 to be terminated as provided for under s. 31(2) of the Act 202;

(iii) a *certiorari* order to vest to this court, and to quash the decision made by the first respondent on 4 May 2020 in refusing the applicants' request that an extraordinary general meeting be held for the necessary motion to be tabled to call for the termination of the Act 202 under s. 31 of the Act 202;

(iv) a *mandamus* order to compel the second respondent to exercise the powers and discretion under s. 31 of the Act 202 to terminate the operation of the Act 202, *via* the following actions:

(a) that the second respondent and with the concurrence of the third respondent, direct the board of Bank Kerjasama Rakyat Malaysia Berhad ("Bank Rakyat") to call a general meeting of the members of the bank for the purpose of constituting a board of directors, as provided for under s. 31(1) of the Act 202;

(b) that after a board of directors has been constituted under the by-laws of Bank Rakyat, the second respondent shall by order publish in the *Gazette* and declare that the Act 202 shall cease to remain in force; and

(c) that the board of Bank Rakyat shall be divested of the management and administration of the bank, and such management and administration shall vest in the board of directors constituted under the by-laws of Bank Rakyat; and

(d) any other transitional steps that may be deemed necessary; and

(v) As a matter of precaution, but only if ruled necessary, that the applicants be given leave to initiate the judicial review application referred to in para. 9(b) above, out of time.

[2] For ease of reference, parties will be referred to as they were in the High Court, that is, the applicants and the respondents. The second applicant has since withdrawn his appeal *via* notice of discontinuance dated 26 April 2022 in encl. 29.

Background Facts

[3] The factual background that prompted the applicant to file an application for leave for judicial review as narrated by the learned High Court Judge (LHCJ) in his grounds of judgment (GOJ) are as follows:

(i) the inception of Bank Rakyat ran back from 28 September 1954, with the establishment of Bank Agong Kampong Bekerjasama-sama Persekutuan Tanah Melayu Dengan Tanggongan Berhad. Initially comprised of 11 bank societies as its members, the bank had the specific aim and objective to provide assistance and raise the standards of living of its members and other cooperative societies, through financial, business and agricultural activities;

(ii) the bank went through various restructuring process and changes of names, from Bank Agong Kerjasama Malaysia Berhad (Bank Agong) in 1964, to Bank Kerjasama Malaysia Berhad (Bank Kerjasama) in 1966, and opened its door of membership to individual entities apart from cooperative societies;

(iii) in 1973, the bank amended its by-laws so as to allow the bank to establish subsidiary companies, apart from changing its name to Bank Kerjasama Rakyat Malaysia Berhad (Bank Rakyat);

(iv) that beginning the late 1970s, however, the bank was faced with severe and serious financial crises, and sought the Malaysian Government's assistance for loan, in order to avoid turning insolvent;

(v) this prompted the then Prime Minister Datuk Hussein bin Onn to submit a proposal in the Dewan Rakyat, in the form of a Bill of Parliament known as the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Bill, for the Malaysian Government to provide financial assistance to Bank Rakyat, while also at the same time to take over the management of the bank under the supervision of the Minister in charge of cooperative societies;

(vi) that the Bill was accordingly passed by both houses of Parliament and assented to by the Agong and effectively became an Act of Parliament on 16 February 1978, and the management of the bank came under the supervision of the Minister in Charge of Cooperative Societies;

(vii) that the supervision and taking over of the bank's management by the Malaysian Government was however never meant to be permanent. In tabling the Bill for the Act in 1977, the then Prime Minister made it expressly clear that it was only a temporary measure, to save the bank from mismanagement and insolvency, and once that had been rectified, the administration and management of the bank will accordingly be handed back to the bank to manage its own affairs;

(viii) the applicants herein had formed a *pro tem* committee and submitted to the second respondent a proposal for the restructuring of Bank Kerjasama Rakyat Malaysia Berhad on 5 July 2018, and nation-wide discussions and meetings between members of Bank Rakyat in general, as well as the *pro tem* committee, were held numerous times between January 2019 to March 2020;

(ix) on 18 March 2019, the applicants through their solicitors wrote to the second respondent requesting that the second respondent exercise his powers and discretions under s. 31 of the Act 202 to terminate the operation of Act 202;

(x) on 16 April 2019, the applicants received the letter dated 12 April 2019 from the second respondent informing his decision rejecting the applicants' application;

(xi) on 5 August 2019, again the applicants' solicitor wrote to the second respondent requesting him to review his decision dismissing their application;

(xii) later, on 27 August 2019 the applicant received a letter dated 23 August 2019 from the second respondent dismissing the applicants' request; and

(xiii) further, on 17 March 2020 the applicants sent a letter to the first respondent requesting a special general meeting to pass a resolution to cease the Act 202. Subsequently on 4 May 2020, the first respondent informed the applicant *via* a letter dismissing the application. The first respondent also stated that the power to cease the Act 202 is the discretion of the second respondent.

[4] Based on the above background, the applicants filed an *ex parte* application for leave to file a judicial review before the High Court with the main intention is to challenge the enforcement of the Act 202.

AG's Preliminary Objections

[5] In response to the applicants' *ex parte* application for leave to file a judicial review, the AG's Chambers raised two preliminary objections as follows:

(i) whether the application is within time and if the answer is negative, whether there are any good reasons to warrant an extension of time; and

(ii) whether the second respondent's decision in dismissing the applicants' application to cease the operation of the Act 202 is amenable to judicial review.

The High Court Decision

[6] The LHCJ agrees with the AG's objection on the timeframe for the applicants to file the judicial review. The second respondent's decision was made through a letter dated 12 April 2019. The decision was communicated to the applicants as admitted by them on 16 April 2019. The applicants' application for judicial review must be made within three months after 16 April 2019. The last date to file would be on 16 July 2019. As the applicant's application was filed on 26 June 2020, there is a delay of almost 11 months. The LHCJ also of the opinion that there is nothing advanced by the applicants to show that they had a good reason, or any reason at all for that matter, for failing to file the application promptly. Thus, this application should be dismissed *in limine*. Furthermore, the decision of the Minister on whether to cease the operation of the Act 202 is not a decision that should be reviewed by the court on the merits of the application since the court is not equipped with the necessary tools to examine the policy decision made by the Minister. Therefore, the decision of the second respondent is non-justiciable and not amenable to judicial review.

The Appeal

[7] The applicants had listed 22 grounds of appeal in their memorandum of appeal. However, learned counsel for the applicants' focused his submission mainly on two main issues that were raised by the AG's Chambers in their preliminary objection, which were later accepted by the LHCJ in his decision.

[8] On the issue of timeframe, learned counsel for the applicant argued that there were three decisions made by the respondents. Firstly, on 16 April 2019, when the second respondent replied that the time was not suitable for Bank Rakyat's management to be divested from the control of the second respondent. Secondly, on 23 August 2019, when the second respondent replied to the applicants' letter dated 5 August 2019 by reiterating the first decision and then went on to say that there is no need to review the Act 202 since there is no resolution passed by the members of Bank Rakyat. Thirdly, on 4 May 2020, when the first respondent responded to the applicants' letter dated 17 March 2020 seeking that an extraordinary general meeting (EGM) to be held, the board refused it citing the reason that the power to end the enforcement of the Act 202 is entirely on the second respondent. It was argued that the three decisions are inter-connected and should be viewed as

a series of decisions. Therefore, the three months period for the applicants to file the judicial review application should be calculated beginning from the decision of the first respondent on 4 May 2020.

[9] As to the grounds to support the application for judicial review, learned counsel for the applicants contended that the second respondent decision was flawed, illegal, and irrational when it refused to consider exercising the exit-clause under the Act 202 on the reason that there has not been any request from members of the Bank, whereas s. 31 of the Act 202 makes no mention of any requirement of a request from members of the bank. As for the first respondent, the decision to refuse an EGM is tainted with illegality and exceeds its own jurisdiction since the said refusal is in contravention of s. 28(1) of the By-Laws of Bank Rakyat which provides that the first respondent has no right to refuse the calling of the EGM.

[10] On the issue of whether the second respondent's decision in dismissing the appellants' application to cease the operation of the Act 202 is amenable to judicial review, learned counsel for the applicants submitted that both the first and second respondents had given their reasons to refuse the applicants' applications. He argued that, it is a trite principle of law that the administrator is not required to give reasons for his decisions when exercising his discretion, but when reasons are provided, those reasons can be scrutinised by the court, so as to ensure that those reasons are sufficient, and not tainted with illegality or irrationality. Therefore, the reasoned decision by first and second respondents are amenable to judicial review.

Our Decision

[11] First and foremost, the law on the time frame to launch an application for judicial review is clear. Order 53 r. 3(6) and (7) of the Rules of Court 2012 (ROC) provide that:

> Leave (O. 53, r. 3)
>
> (6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.
>
> (7) The court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.

[12] Generally, failure to comply with the prescribed time limit provided under O. 53 r. 3(6) of the ROC is fatal. See the Federal Court decisions in *Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; [1983] 2 MLJ 54 at p. 55 and *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161 at p. 171. See also this court's decisions in *Yahya Kassim v. Kerajaan Malaysia & Anor* [1998] 1 CLJ 43; [1997] 3 MLJ 749 at pp. 751-752; *V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd*

& Ors [1997] 2 CLJ 675; [1997] 2 MLJ 764 at p. 773; *Ah San v. Majlis Bandaraya Ipoh & Ors* [2000] 2 CLJ 125; [2000] 1 MLJ 615 at p. 617 and *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123; [2010] 4 MLJ 360 at pp. 382 to 383. High Court in *Mohd Ismail Abd Ghani v. Ketua Pengarah Pendaftaran Negara & Anor* [2011] 5 CLJ 660; [2012] 1 MLJ 707 at pp. 714-715 Aziah Ali J (as she then was) held that:

> [9] Certain breaches of the rules are serious in that it may go to the very root or foundation of the legal process. If that happens, the court is reluctant to exercise its discretion in favour of validating that breach (per Abdul Malik Ishak JCA in *Malayan Banking Bhd v. Koay Kang Chuwan & Anor* [2010] 5 MLJ 46; [2010] 6 CLJ 172). In respect of an application for judicial review, compliance with the time frame is fundamental. It goes to the starting point, that of jurisdiction to hear the application (see *Yahya bin Kassim v. Government of Malaysia & Anor* [1997] 3 MLJ 749).
>
> [10] Counsel for the applicant relies on O. 1A of the RHC. It is worthwhile to refer to the judgment of Zaki Tun Azmi CJ in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor And Another Appeal* [2009] 1 MLJ 625; [2009] 4 CLJ 329 wherein His Lordship said as follows:
>
> > The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O. 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A of the RHC cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules.
> >
> > In the context of the Rules of the High Court 1980 the phrase '... technical non- compliance ...' is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature.
>
> Therefore, I am of the view that O. 1A cannot be relied on to supersede O. 53 r. 3(6) which is a rule mandatory in nature.

[13] Be that as it may, O. 53 r. 3(7) of the ROC allowed the exercise of discretion to extend the time limit imposed by O. 53 r. 3(6) of the ROC. There are a considerable number of decisions that allowed the extension of time to file a judicial review application. The courts have accepted that their power to extend time should be exercised judiciously, that they should articulate the criteria they are applying and should provide reasons for their ruling. The court would not grant the application for extension unless positively satisfied that it was proper to do so. The *prima facie* rule is that, as the pre-condition to the exercise of discretion, the applicant must show good reasons for the delay. The judicial rulings indicate that what

explanations for delay will be acceptable may vary according to the circumstances of each case. See this court decision in *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283; [2017] 2 MLJ 197; *Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd* [2019] 4 CLJ 454; [2019] 2 MLJ 716 and *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* (*supra*).

[14] In dealing with the application for extension of time, we are mindful that the stringent conditions imposed by O. 53 of the ROC are intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delays in resolving applications in the interest of good administration. See the Federal Court decision in the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145. At p. 897 (CLJ); p. 172 (MLJ), the Federal Court went on to say as follows:

> However, O. 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right protected to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court.

[15] Coming back to the present appeal, it is not disputed that the second respondent rejected the applicants' request to terminate the operation of the Act 202. The said decision was clearly stated in the second respondent letter dated 12 April 2019 (the rejection letter) which was sent to the applicants and received by the applicants on 16 April 2019. The rejection letter was in response to the applicants' letter dated 18 March 2019 titled "Permohonan Pemansuhan Akta 202 Akta Bank Kerjasama Rakyat Berhad (Peruntukan Khas 1978)". Paragraph 2 of the rejection letter stated that:

> Seperti mana tuan sedia maklum, subseksyen 31(1) Akta 202 menyatakan apabila Menteri berpendapat bahawa tidak lagi perlu bagi akta ini terus berkuat kuasa. Peruntukan ini menjelaskan bahawa pertimbangan adalah pada Menteri untuk menentukan bila keadaan yang sesuai. Saya berpandangan dengan melihat kepada keadaan semasa, ini bukan masa yang sesuai untuk Bank Rakyat beroperasi dan ditadbir tanpa kawalan daripada Kementerian Pembangunan Usahawan bagi menjaga kepentingan Bank Rakyat secara keseluruhan.

Even though the second respondent had not explicitly said that the applicants' application was rejected, it cannot be denied that the gist of the second respondent's answer in the rejection letter was to reject the applicants' application based on the reason that "ini bukan masa yang sesuai untuk Bank Rakyat beroperasi dan ditadbir tanpa kawalan daripada Kementerian Pembangunan Usahawan bagi menjaga kepentingan Bank Rakyat secara

keseluruhan." Based on the rejection letter, we are of the same view with the LHCJ that the time to file the judicial review application against the second respondent's decision started to run from 16 April 2019 which lasted until 16 July 2019.

[16] Instead of filing a judicial review challenging the second respondent's decision in rejecting their application, the applicants through their solicitor wrote another letter dated 5 August 2019 titled "Permohonan Untuk Menyemak Semula Penolakan Permohonan Pemansuhan Akta Bank Kerjasama Rakyat Berhad (Peruntukan Khas 1978)" to the second respondent, requesting him to review his decision dismissing their application. Once again, through a letter dated 23 August 2019 which was duly accepted by the applicants on 27 August 2019, the second respondent dismissed the applicants' request (the second rejection letter). Paragraph 2 of the second rejection letter stated that:

> Saya ingin tegaskan bahawa tiada keperluan untuk kajian semula Akta Bank Kerjasama Rakyat Berhad (Peruntukan Khas 1978). Di samping itu, tiada apa-apa resolusi oleh ahli-ahli Bank Rakyat semasa Mesyuarat Agung Tahunan supaya perkara ini dikaji semula. Oleh itu, keputusan saya di surat bertarikh 12 April 2019 adalah muktamad.

[17] From the plain reading of the second rejection letter, it is obvious that the second respondent did not make any new decision with regard to the applicants' application to terminate the operation of the Act 202. In the second rejection letter, the second respondent did emphasise that there is no need to review the enforcement of the Act 202. More so, the second respondent had stressed that his earlier decision was final. Therefore, we cannot agree with learned counsel for the applicants' contention that the second rejection letter is a new decision by the second respondent.

[18] As regards to the second sentence in the second paragraph of the second rejection letter, which refers to the resolution by the members of Bank Rakyat, we are not in agreement with learned counsel for the applicants' arguments that the said second respondent's response would amount to a condition to his earlier decision. Clearly, the second respondent is citing an example or a situation that can be considered as a step to ask for a review on the enforcement of the Act 202. There is nothing to stop the applicants from tabling the necessary motion in the annual general Meeting (AGM) of the members of Bank Kerjasama Rakyat Berhad to call for a resolution to terminate the Act 202 as provided under s. 31 of the Act 202. After obtaining the resolution, the applicants can proceed to make an application to the second respondent to terminate the enforcement of the Act 202. Of course, this has to be done separately and it cannot be tied up with the second respondent's earlier decision *via* the rejection letter.

[19] Likewise, we are also not with the applicants in their attempt to implicate the first respondent's action to justify the extension of time. According to the applicants, based on the so-called new decision by the second respondent in the second rejection letter, the applicant went on to go on a nation-wide discussions and meetings among the members of Bank Kerjasama Rakyat Berhad in general, as well as setting up a pro tem committee, and various roadshows, with the prime goal to have a general meeting so as to allow a motion to be tabled and resolved on the need for the Act 202 to be terminated. However, the first respondent rejected the applicants' proposal on 4 May 2020. It was argued that the first respondent's rejection is a decision that amounts to an extension of time for the applicants to challenge the rejection letter.

[20] With due respect, we are of the view that the first respondent's decision not to call the general meeting as requested by the applicants is a separate and distinct decision from the second respondent's decision *via* the rejection letter. It cannot be considered or viewed as a series of decisions based on the simple reason that the second respondent had made a clear and equivocal decision to reject the applicants' application. Furthermore, the discretionary power to terminate the operation of the Act purely lies with the second respondent with the concurrence of the Minister of Finance, and not with the first respondent as clearly provided under sub-s. 31(1) of the Act 202. Thus, the applicants' effort to tie up the first respondent decision in rejecting the calling of general meeting with the second respondent decision in rejecting the application to terminate the operation of the Act 202 as a series of decision could not stand.

[21] Next, as a matter of precaution, the applicants did pray for an extension of time to file leave to initiate the judicial review in their application before the High Court. The LHCJ found that there was no sufficient or good reason given by the applicants for the court to exercise its discretion. The explanation for the delay was not accepted by the trial Judge and he ruled that the delay had not been satisfactorily explained. The reasons given by the LHCJ in rejecting the applicants' extension of time are as follows:

> 23. Upon perusal of the cause papers, I find that there is only one ground stated in the applicants' Statement and Affidavit. They blamed the second respondent's letter dated 23.8.2019 of requesting them to obtain the resolution from the members of Bank Rakyat.
>
> 24. The applicants alleged after the said letter, they conducted 12 road shows throughout the country to obtain the mandate from the members of Bank Rakyat. After the said road show, they wrote to the First respondent on 17.3.2020 seeking for a special general meeting.
>
> 25. Therefore, it would be incumbent upon this court to examine and determine whether the reason given is a good reason to justify an extension of time.

A

> 26. Based on the reason given by the applicants, I find that there is no sufficient or good reason given for this court to exercise its discretion for an extension of time.
>
> 27. From the reason given by the applicants, they are saying the respondents caused the delay. To me, this is just an excuse. Upon perusal
B of the cause papers, I find that the applicants knew and were aware on the decision-making process to cease the Act 202.
>
> 28. This is evident when the applicants wrote to the second respondent on 18.3.2019. When their application was rejected on 12.4.2019, again they wrote to the second respondent to consider his earlier decision.
>
C 29. The manner to cease operation of the Act is prescribed under s. 31 of Act 202. Since the legislation gives such discretion to the Minister, then any challenge should be against the said Minister's decision.
>
> 30. More importantly, the applicants were represented by a solicitor from the very beginning. I find that even the application dated 18.3.2019
D (Exhibit AAZ-5) was written by their solicitor. Hence, there is no excuse.

[22] Looking at the given reasons and the three affidavits affirmed by the applicants in supporting their application before the High Court, we are of the view that the LHCJ did not err in his finding. Upon perusing the three affidavits filed by the applicants that can be sieved through the appeal
E records, we find that there is no explanation at all for the delay. The only ground that has been considered by the LHCJ in his decision is actually not a direct explanation by the applicants on the delay. It is just an inference based on the action taken by the applicants upon receiving the second rejection letter from second respondent. In fact, not a single paragraph in
F those affidavits gave reason why they were late in filing the application.

[23] On the issue of the delay, we can appreciate the applicants' standpoint. For them, they are on time based on the date of the latest decision by the first respondent. However, as correctly decided by the LHCJ, the manner to cease operation of the Act 202 as prescribed under sub-s. 31(1) of the Act
G 202, the discretion was given to the second respondent. Thus, any challenge should be against the second respondent's decision and not anyone else.

[24] The principle of law on the jurisdiction of the High Court in relation to the timeframe once the explanation for the delay was rejected is clear. In *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013]
H 4 CLJ 193; [2013] 4 MLJ 161 the Federal Court came to the following conclusion:

> [30] In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the
I delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

Earlier, in *Ravindran P Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168, the Federal Court held as follows:

> In our view the whole issue is clearly one of jurisdiction. In the event only the first consideration of the Judge is relevant. Since the Judge rejected the explanation for the delay it follows that the court had no jurisdiction to hear the application for leave for an order of *certiorari*. Whether the application for an order of *certiorari* had merits or not was irrelevant. This principle is implicit in *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower* [1983] 2 MLJ 54. There had been no jurisdiction to hear the application for *certiorari* because Order 53 Rule 1A of the Rules of the High Court 1980 expressly directs that leave shall not be granted "unless the application is made within six weeks after the date of the proceeding".

Therefore, once the LHCJ rejected the explanation of the delay, which we are in agreement with the said rejection, the High Court ceased jurisdiction to hear the application for an order of *certiorari*. The LHCJ is correct in denying leave to the applicants in such a situation.

[25] Based on our finding on the issue of timeframe alone, the applicants' application for leave to file judicial review should fall. Be that as it may, for completion, we will also deal with the second issue raised by the AG's Chambers. The question is, whether the second respondent's decision in dismissing the applicants' application to terminate the operation of the Act 202 is amenable to judicial review.

[26] To begin with, we like to refer to the source of power under the law that deals with the termination of the operation of the Act 202. For ease of reference, we produce the entire provision of s. 31 of the Act 202 as follows:

> **Power to terminate operation of Act**
>
> 31. (1) If at any time it appears to the Minister that it is no longer necessary that this Act should remain in force, the Minister may, with the concurrence of the Minister of Finance, direct the Board to call a general meeting of the members of the Bank for the purpose of constituting a Board of Directors under the by-laws of the Bank.
>
> (2) As soon as possible after a Board of Directors has been constituted under the by-laws of the Bank pursuant to subsection (1), the Minister may by order published in the Gazette declare that this Act shall cease to remain in force, and such an order may contain such consequential or transitional provisions as the Minister may deem necessary or expedient.
>
> (3) Subject to subsection (4), on the date when the order under subsection (2) takes effect, the Board shall be divested of the management and administration of the Bank, and such management and administration shall vest in the Board of Directors constituted under the by-laws of the Bank pursuant to subsection (1).

A (4) Notwithstanding subsection (3), until such time as the Board of Directors constituted under the by-laws of the Bank meets or holds its first meeting, the Board established under subsection 4(1) may continue to manage and administer the affairs of the Bank on behalf of the said Board of Directors.

B **[27]** In interpreting a statute, Lord Diplock in *Duport Steels Ltd & Ors v. Sirs & Ors* [1986] 1 WLR 142 at p. 157 held as follows:

... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words C is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally D justifiable. Under our constitution, it is Parliament's opinion on these matters that is paramount.

His Lordship further held that:

It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, E under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest. ...

In another decision in *Fothergill v. Monarch Airlines* [1980] 3 WLR 209 at F p. 221, Lord Diplock said:

The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining 'the intention of Parliament'; but what this metaphor, though convenient, omits to take into account is that the court, when acting in G its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European court, the need for legal H certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If I the meaning of those words is clear and unambiguous and does not lead

to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.

[28] Back to our jurisdiction, Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; [1994] 3 MLJ 345 made following observation at p. 292 (CLJ); p. 352 (MLJ):

It is right to say at the risk of being trite, that in interpreting a statute, what the court is endeavouring to do is to give effect to the object and intent of Parliament in enacting that statute. In Cheatley v R (1972) 127 CLR 291, Barwick CJ said at p 296: 'In construing the section we are seeking Parliament's intention'. Similarly, in *A-G (Canada) v. Hallet & Carey Ltd* [1952] AC 427, Lord Radcliffe said at p 449: '... every statute is to be expounded according to its manifest or expressed intention'.

To whom can the judges turn for help in their task of determining Parliament's intention? The orthodox view is not Parliament or the draftsman; they have to discover that intention from the words that Parliament has used in the particular statute. This proposition has been well brought out by Lord Simon of Glaisdale in *Farrell v. Alexander* [1977] AC 59 at p. 81; [1976] 2 All ER 721 at p. 733; [1976] 3 WLR 145 at p. 158:

> ... in the construction of all written instruments including statutes, what the court is concerned to ascertain is, not what the promulgators of the instruments meant to say, but the meaning of what they have said. It is in this sense that 'intention' is used as a term of art in the construction of documents.

In *Hatton v. Beaumont* [1977] 2 NSWLR 211, the court had occasion to observe at p. 225:

> The function of the court ... is to give effect to the intention of the legislature. This it may do without difficulty where it appears from the terms of the legislation that the legislature directed its attention to the question and expressed an intention upon the effect to be given to the particular provision. But in most cases ... such an intention is not expressed and the court's task is, by the application of the appropriate principles, to divine or impute that intention.

It is a truism that Parliament does not always use plain words to express its intention and when this is the case so that the words used fail to convey the intention, courts may then have to resort to the device of ascertaining that intention by necessary implication from the words which

A Parliament has used. Courts are, however, slow to find an intention by mere implication. (See *Young v. Farrah & Nicholas Enterprises Pty Ltd* (1976) 13 SASR 444 at p. 454 per Hogarth J).

[29] Applying the above principle of law in interpreting s. 31 of the Act 202, it is plain and obvious that the discretion was given to the second B respondent with the concurrence of the Minister of Finance, to decide on the termination of the Act 202. The exercise of discretion can be done at any time if it appears to the second respondent that the enforcement of the Act 202 is no longer necessary. Under the law, only the second respondent with the concurrence of the Minister of Finance can determine the appropriate C time to terminate the enforcement of the Act 202. From the unambiguous right given under sub-s. 3(1) of the Act 202, second respondent rejected the applicants' application citing the following reason: "Saya berpandangan dengan melihat kepada keadaan semasa, ini bukan masa yang sesuai untuk Bank Rakyat beroperasi dan ditadbir tanpa kawalan daripada Kementerian D Pembangunan Usahawan bagi menjaga kepentingan Bank Rakyat secara keseluruhan" as clearly stated in the rejection letter.

[30] From the given reason, it is comprehensible that the second respondent had purely made a policy decision in exercising his discretionary power. As a Minister that oversee the implementation and the enforcement E of the Act 202, the second respondent had clearly indicated that it is not suitable to terminate the operation of the Act 202 under the current situation. It is trite that the courts normally do not meddle with the policy decision. Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 at p. 197 had this to say:

F Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will G have to be applied.

For example, where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underlie such decisions, courts ought not to review the reasoning of the administrative body, with a view to substituting their H own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of power on the part of the courts.

In *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 at p. 188, His Lordship Raja Azlan Shah FJ (as His Highness then was) I made the following observation:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 107 at p 118:
>
> > Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the legislature.

In a more recent decision, the Federal Court in *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561 observed that:

> [48] It is trite that not all cases brought before courts are reviewable. Before proceeding to hear a case, a court must first examine, *inter alia*, its justiciability. "Justiciability" concerns the limits upon legal issues over which a court can exercise its judicial authority. Non-justiciability in its administrative law sense signifies that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief.
>
> [49] The issue of justiciability in an application for leave for judicial review was considered in great detail by Mohamad Ariff Md Yusuf J (as he then was) in *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128:
>
> > "Non-justiciable Issues
> >
> > In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a court of Law, because the issue involved is not justiciable.
> >
> > ... The most prominent amongst non-justiciable issues are those which are known in the U.S.A. as "political questions", which means that the subject matter of the question is such that it is not capable of a judicial determination (at p 256).
> >
> > The learned authors of *De Smith's Judicial Review* (6th Ed) have also appropriately observed in this connection that despite the wholesome development of administrative law, "the fact remains, however, that there are some issues which are inherently unsuited

A to adjudication" and in this category of case, "the court acknowledges that the litigation process and the expertise of the court are unsuited to resolving the question in hand". (at p 121).

A good definition of "justiciability" can also be found in Chris Finn, "*The Concept of 'Justiciability' in Administrative Law*" in Groves & Lee, Australian Administrative Law (2007):

B

"The term "justiciability" refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a court which feels that its resolution either is beyond the institutional competence of the court or would involve stepping outside its appropriate constitutional role. (at p. 143).

C

D **[31]** There are certain areas which the court is reluctant to delve into. These include the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, the dissolution of Parliament and the appointment of Ministers. Such powers are governed by broader policy considerations E which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the courts. One such instance is the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) ("the *GCHQ* case").

[32] Based on those decided principles, we are in agreement with the LHCJ F view that the decision of the second respondent is non-justiciable and not amenable to judicial review.

Conclusion

[33] For the reasons stated above, we find that there is no merit in the G applicants' appeal to warrant any interference from this court. Accordingly, we are unanimous in dismissing this appeal with cost. The decision of the High Court is hereby affirmed. The applicants are ordered to pay cost of RM10,000 to the respondents subject to allocatur.

H

I